IN THE

Supreme Court of the United States

October Term, 1978

No. 78-1605

NATHAN S. JACOBSON, *et al.*,

Petitioners,

vs.

ROBERT ROSE, individually and as District Attorney of the County of Washoe, State of Nevada, *et al.*,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Petitioners, Nathan S. Jacobson, Ronald Friedland, Richard F. Levy, Sandy Jacobson, Forrest Paull, Edward Jacobson, Clyde Billman, Arthur Selman, Sylvia Jacobson, Sam Jacobson, Thomas R. Sheridan, and ALW, Inc., dba Kings Castle Hotel and Casino, respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on November 29, 1978. That judgment and opinion affirmed in part, reversed in part, and remanded a judgment entered by the United States District Court for the District of Nevada.

Opinion Below.

The opinion of the Court of Appeals of which petitioners seek review is not yet reported; a copy is appended hereto as Appendix "A". The order of the Court of Appeals denying petitioners' petition for rehearing is unreported; a copy is appended as Appendix "B".

Jurisdiction.

The Court of Appeals' judgment was entered on November 29, 1978. The Court of Appeals denied a timely petition for rehearing on March 21, 1979. This petition is being filed within 30 days of the Court of Appeals' order denying the petition for rehearing. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Questions Presented.

1. This action was tried in the District Court on the basis of a complaint filed by the twelve petitioners against the respondents, Robert Rose, the District Attorney of Washoe County, Nevada; Robert Galli, the Sheriff of Washoe County; Larry Hicks, an Assistant District Attorney of Washoe County; Thomas Franklin Benham, William J. Whitmire, and Lorne Butner, members of the Sheriff's Department of Washoe County; and Bell Telephone of Nevada. The action was initiated to recover civil damages as a result of the respondents' illegal interception of telephonic communications in violation of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §2510-2520. After trial, the jury returned verdicts on behalf of each of the petitioners against each of the respondents. These verdicts were based in part upon the District

Court's order granting certain directed verdicts and in part upon the jury's deliberation. However, both prior to and following the jury's verdict, the District Court made various rulings, subsequently upheld by the Court of Appeals, which (1) limited the petitioners' statutory damages, reasonable attorney's fees and actual costs under 18 U.S.C. §2520; and (2) disallowed jury instructions relative to certain petitioners' claims for punitive damages under 18 U.S.C. §2520. The rulings of the District Court, as upheld by the Court of Appeals, present the following questions:

a. Whether *each* petitioner is entitled to receive statutory damages of $1,000 under 18 U.S.C. §2520 from *each* respondent found liable by the District Court and the jury.

b. Whether the petitioners are entitled to an award of reasonable attorney's fees and all other actual costs as authorized by 18 U.S.C. §2520.

c. Whether all of the petitioners, as authorized by 18 U.S.C. §2520, were entitled to a jury instruction on punitive damages against all but two of the respondents, when the District Court specifically found the entire wiretapping to be oppressive in nature.

2. On appeal, the Court of Appeals reversed the District Court's judgment, ruling that respondents Bell Telephone of Nevada, William J. Whitmire and Lorne Butner were entitled to a judgment N.O.V., or at least a jury instruction, under the defense of good faith reliance upon a court order, which presents the following questions:

a. Whether respondent Bell Telephone of Nevada is entitled to the defense of good faith reliance

upon a court order, under any subjective/objective standard, when Bell Telephone of Nevada (1) assisted in drafting the court order which authorized the initial wiretaps, and thus knew of the court-ordered deadline; (2) set up the wiretapping equipment that was utilized by the other respondents; and (3) had its own employees work on the wiretapped lines beyond the court-ordered deadline.

b. Whether respondents Whitmire and Butner are also entitled to the defense of good faith reliance upon a court order under any subjective/objective standard, when these respondents would not have participated, as they did, in the illegal wiretapping activities beyond the court-ordered deadline, if they had actually relied upon the court order.

Statutory Provisions Involved.

18 U.S.C. §2520 provides:

"Any person whose wire or oral communication is intercepted, disclosed, or used in violation of this chapter shall (1) have a civil cause of action against any person who intercepts, discloses, or uses, or procures any other person to intercept, disclose, or use such communications, and (2) be entitled to recover from any such person—

(a) Actual damages but not less than liquidated damages computed at the rate of $100 a day for each day of violation or $1,000, whichever is higher;

(b) Punitive damages;

(c) A reasonable attorney's fee and other litigation cost reasonably incurred.

A good faith reliance on a court order or legislative authorization shall constitute a complete defense to any civil or criminal action brought under this Chapter or under any other law."

Statement of the Case.

This petition focuses on (1) the measure of damages, attorney's fees and costs to be awarded individuals and entities that successfully plead and prove violations of the wire interception provisions of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §2510-§2520; and (2) the liability of those who violate the provisions by extending wire interceptions beyond a court-ordered deadline. This petition presents a case of first impression, inasmuch as the Court of Appeals' opinion is the first appellate interpretation of the civil statutory provisions contained in 18 U.S.C. §2520.

The evidence in this case forcefully disclosed a scheme—devised and accomplished by the respondents who were law-enforcement personnel of Washoe County, Nevada, with the assistance of respondent Bell Telephone of Nevada—to violate petitioners' and others' right of privacy by seeking and then disregarding the terms of respondents' own sought-after court order. This misuse of police power had its origins in an ongoing dispute between Nathan S. Jacobson and local Washoe County authorities over the operations of Kings Castle Hotel and Casino, a luxury resort of 470 rooms at Incline Village near Lake Tahoe, Nevada. In the early 1970s, Kings Castle was operated by petitioner ALW, Inc. Petitioner Nathan S. Jacobson was the chief executive officer of Kings Castle and, together with members of his family, owned and controlled

Kings Castle through ALW, Inc. During Jacobson's management of Kings Castle, Jacobson and the local Washoe County authorities had become involved in various disputes over the operation of the hotel and casino in matters regarding zoning, fire regulations, and permits. These disputes were inflamed by Jacobson's statements to the public and in the press which were highly critical of Washoe County District Attorney, Robert Rose, and other local authorities, including Washoe County Sheriff, Robert Galli.

The confrontation between Jacobson and the local officials took a bizarre turn in September, 1971, when Jacobson and two other employees of Kings Castle questioned the Kings Castle Keno manager, Ray Landucci, after Jacobson had been informed that Landucci was involved in a scheme to bilk Kings Castle through an illegal manipulation of the Keno payoffs. As a result of this incident, respondent Thomas Franklin Benham, Deputy Chief of the Washoe County Sheriff's Department, contacted Landucci, who subsequently had meetings with Benham and District Attorney Rose and Larry Hicks, an Assistant District Attorney.

The meetings between Washoe County authorities and Landucci resulted in an investigation of Jacobson and one of his employees at Kings Castle for first-degree kidnapping and extortion and, further, provided the impetus for seeking wholesale wiretaps of Jacobson's and Kings Castle's telephone lines on the pretext of uncovering evidence in support of the investigation, including evidence of would-be threats from Jacobson to Landucci.

The telephone lines sought by respondents to be wiretapped at Kings Castle included not only Jacobson's personal telephone, but also the switchboard lines for

the entire 470-room hotel-casino and the two Kings Castle Wide Area Telephone Service ("WATS") lines for nation-wide and state-wide telephone calls. Ultimately, based upon the affidavit of District Attorney Rose, the Washoe County Judicial District Court issued an order, authorizing the interception of the Kings Castle switchboard, the Kings Castle United States and Nevada WATS lines, Jacobson's private line, and Sheriff Galli's and Ray Landucci's home telephone lines. Such interceptions would, of course, result in the invasion of telephone conversations of hotel guests having no relationship to Jacobson, and the respondents knew that wiretapping the WATS lines would result only in the interception of outgoing long-distance calls and that any calls from Jacobson to Landucci would have been local calls which could not have been placed on the WATS lines. At the trial of this matter, it was admitted that certain of the respondents knew and discussed the fact that a court-authorized wiretap solely of Landucci's home telephone would result in the interception of any threats to Landucci and, thus, render unnecessary any wiretaps of the Kings Castle lines.

The order of the Washoe County Judicial District Court authorizing the wiretaps was dated September 20, 1971, and requested Bell Telephone of Nevada ("Nevada Bell") to cooperate with the authorities in effectuating the interceptions. As a consequence, after the issuance of the order, a local attorney for Nevada Bell, not familiar with wiretap orders, telephoned an attorney with the San Francisco law firm of Pillsbury, Madison & Sutro, which represented Nevada Bell's parent company. After discussing the order, both the local attorney and the attorney with Pillsbury, Madison

& Sutro decided the order should be drafted with more specificity. Thereafter, the local attorney for Nevada Bell telephoned District Attorney Rose and both men went over the language that Nevada Bell's San Francisco counsel thought should be inserted in the order. Subsequently, Assistant District Attorney Hicks and Nevada Bell's attorneys worked on a proposed amended order.

The proposed amended order, presented by respondents to the Washoe County Judicial District Court, contained the language suggested by Nevada Bell's attorneys and specifically provided that the order would terminate when the communications concerning alleged threats to Landucci and admissions by Jacobson had been intercepted. The amended order, dated September 29, 1971, further specifically provided that even if such communications were not intercepted, the order was to terminate 30 days from September 20, 1971, the date of the original order. The amended order also provided that 18 U.S.C. §2518(8)(d) which contains the inventory requirements of court-authorized interceptions must be complied with. By virtue of the amended order, the maximum authorized period of interceptions terminated on October 20, 1971.

Despite the fact that the amended order was dated September 29, 1971, the respondents did not commence the interceptions and recordings until October 18, 1971, —two days prior to the court-ordered deadline of October 20, 1971. Furthermore, in complete disregard of their own requested court order, the respondents conducted the interceptions and recordings of the wiretapped lines for a period of nine days beyond the court-imposed deadline, and the wiretap paraphernalia

was not disconnected by Nevada Bell until November 8, 1971.

Not one of the respondents did anything to stop the interceptions and recordings beyond the deadline of October 20, 1971; nor did any of the respondents ever give instructions to, or attempt to, refrain from monitoring certain telephone conversations or to minimize the interceptions. Also, no inventory pursuant to 18 U.S.C. §2518(8)(d), was ever made. Furthermore, Nevada Bell sent its employees to the Sheriff's substation where the interceptions and recordings took place, to correct problems that developed on the wiretapped lines after the deadline of October 20, 1971. These employees, while present at the Sheriff's substation, overheard communications that were being intercepted and recorded.

In intercepting the telephone conversations, the Sheriff's Office used cassette tapes, with 20-, 30-, or 40- minute capacities per side. The interceptions and recordings produced a total of 49 cassettes. The cavalier manner in which the wiretapping was conducted is also well illustrated by the fact that, by virtue of a mistake in the amended order, one of the lines wiretapped was not even included in the order. Yet, the respondents took no steps to correct the mistake.

The interceptions and recordings resulting from the court order produced absolutely no telephone calls from Jacobson to Landucci or, for that matter, anything which assisted in the so-called investigation of Jacobson. Despite this fact, however, the Washoe County District Attorney's Office proceeded with its criminal case against Jacobson. The Washoe County Grand Jury indicted Jacobson and one of his employees at Kings

Castle on charges of first-degree kidnapping and extortion. Yet, the County Grand Jury was not informed by the District Attorney of the existence of the wiretaps or the fact that the interceptions and recordings failed to produce a shred of evidence against Jacobson and his employee. After the indictment was returned, the District Attorney's Office decided that the indictment was vulnerable and moved to dismiss the indictment without prejudice so that a criminal complaint could be brought for a second-degree kidnapping, coercion, and false imprisonment. In the criminal proceedings that followed, the wiretaps were suppressed and Jacobson and the other defendant were acquitted of all charges against them.

The sole demonstrable effect of the wiretapping and its extension beyond the court-ordered deadline was an egregious violation of the statutory scheme provided by 18 U.S.C. §2510-§2520, and a devastating infringement of the petitioners' right of privacy. After the court-ordered deadline, the interceptions and recordings surreptitiously invaded the private conversations of petitioners Jacobson, his sons, Sandy and Edward Jacobson, his then-wife, Sylvia Jacobson, his brother, Sam Jacobson, as well as employees of Kings Castle, Forrest Paull, Arthur Selman, and Clyde Billman, and attorneys for Jacobson and Kings Castle, Ronald Friedland, Esq., Richard Levy, Esq., and Thomas R. Sheridan, Esq., with whom Jacobson discussed confidential attorney-client matters.

In addition to invading petitioners' right of privacy by illegally intercepting and recording their conversations, including privileged communications between lawyer and client, and husband and wife, the respondents

compounded this invasion of privacy by offering the contents of the intercepted and recorded conversations to the Nevada Gaming Control Board, the Federal Bureau of Investigation and the Department of Justice.

At the trial in this case, after the presentation of the evidence, the District Court, noting that the entire wiretapping had been oppressive, directed the jury to return verdicts for statutory damages on behalf of each petitioner against each respondent, except respondent Nevada Bell. The liability of Nevada Bell was submitted to the jury for deliberation. Furthermore, over the petitioners' objection, the District Court ruled that the jury would only be instructed as to punitive damages on behalf of petitioners Nathan S. Jacobson and ALW, Inc., and the District Court ruled that this instruction would not be given as against respondents Nevada Bell, Butner and Whitmire. Although petitioners did not object to the punitive damage ruling regarding respondents Butner and Whitmire, they did argue that the jury should receive an instruction on punitive damages against Nevada Bell. The jury returned verdicts for statutory damages under 18 U.S.C. §2520 on behalf of each of the twelve petitioners against each of the seven respondents.

Despite the jury verdicts, however, the District Court in post-trial proceedings ruled that the respondents' liability to each petitioner was joint and several. Consequently, each of the twelve petitioners, rather than receiving $1,000 from each of the seven respondents, was limited by the District Court's ruling to a recovery of $1,000 from all of the respondents. Thus, the District Court limited the entire judgment for statutory damages for all twelve respondents to the total sum of $12,000.

The District Court's post-trial ruling also limited the award of attorney's fees authorized by section 2520. After trial, petitioners introduced evidence that over 450 hours of attorneys' time had been devoted to litigating the action. At normal billable rates, these hours totalled in excess of $40,000 as attorney's fees or, in other words, slightly over $3,333 per plaintiff. Yet, the District Court reasoned that it could not award attorney's fees in excess of the judgment and, hence, limited the award of attorney's fees to $12,000. Also, despite the fact that the petitioners had incurred $10,246.68 as costs in the litigation, the District Court permitted only $4,690.48 as costs. On appeal, the Court of Appeals upheld these rulings by the District Court.

In its opinion, the Court of Appeals also reversed the District Court's judgment against respondents Nevada Bell, Whitmire and Butner, ruling that these respondents were entitled to a judgment N.O.V., or at least a jury instruction, under the defense of good faith reliance upon a court order. Yet, the evidence at trial was uncontradicted that Nevada Bell assisted in drafting the court order in question and thus knew of the deadline, set up the wiretapping equipment utilized by the other respondents, and even had its own employees work on the wiretapped lines after the court-ordered deadline. Furthermore, with respect to respondents Whitmire and Butner, the District Court had found that they were knowingly involved in the illegal interceptions.

REASONS FOR GRANTING THE WRIT.

1. The Court of Appeals' Decision, Which Is the First Appellate Ruling on the Application of 18 U.S.C. §2520, Presents Important Questions Concerning the Civil Remedies to Be Applied Upon Violations of the Wiretap Provisions.

A. Liquidated Damages Under §2520 Should Not Be Based on Joint and Several Liability, Which Limits Each Petitioner to a Judgment of $1,000 Regardless of the Number of Respondents Participating in the Illegal Wiretap; Rather Under the Statute, Each Petitioner Should Receive the Minimum Liquidated Sum of $1,000 From Each Respondent.

Throughout Title III of the Omnibus Crime Control and Safe Streets Act, Congress evidenced a strong prohibition of wiretapping, except by law enforcement under very limited conditions and with court supervision. In this case, respondents sought and obtained a court order allowing large-scale wiretapping, but which on its face set forth the date of termination. In spite of the court order, however, the respondents cavalierly continued their wiretap beyond the court ordered termination date and, thus, engaged in the type of activity which §2520 was designed to redress.

Section 2520 clearly provides that "any person" aggrieved by violations of the wiretapping provisions (1) shall have a cause of action against "any person" who intercepts, discloses or uses the intercepted communications, or procures any other person to do so, and (2) shall be entitled to recover from "any such person" actual damages or at least minimum liquidated damages of $1,000. Yet, despite this explicit statutory wording, the Court of Appeals, by its decision in this case, has rewritten the statute to limit an aggrieved

person's damages to $1,000 against "all persons" who participate in the illegal wiretapping. Thus, under the decision of the Court of Appeals, a successful plaintiff, absent a showing of actual damages, is entitled to liquidated damages of $1,000 regardless whether one or one thousand persons are involved in the illegal interception.

The petitioners submit that the Court of Appeals' decision contradicts the clear wording of §2520. Indeed, the Court of Appeals' rationale in support of its decision severely weakens the remedial as well as the deterrent effects of §2520. Undoubtedly, a plaintiff's privacy is more invaded, and his injury compounded, by one thousand persons participating in the interception and recording of his private communications than by only one person. However, the Court of Appeals' decision limits the plaintiff to the statutory minimum of $1,000 regardless of the fact that a multitude of people have illegally invaded his privacy.

In its opinion, the Court of Appeals stated that an injured plaintiff would receive a "windfall" if multiple defendants were individually liable for the liquidated damages provided in §2520. The Court of Appeals reasoned that individual liability as opposed to joint and several liability would more than reimburse a plaintiff for his loss. Yet, petitioners submit that the Court of Appeals' rationale has overlooked the simple fact that the greater number of people illegally intercepting and overhearing private communications, the greater the injury to the plaintiff. Obviously, Congress provided for liquidated damages as an alternative to actual damages, because of the difficulty in ascertaining actual damages on proof of an invasion of privacy through the violation of the wiretapping statute. Furthermore, by ruling that liability under §2520 is joint and several, the Court of Appeals has weakened the statute by encouraging illegal wiretappers to engage in outrageous invasions of an individual's privacy by recruiting as many participants in the invasion as possible. An individual faced with the minimum $1,000 liability for making an illegal wiretap may think twice before he goes forward. However, under the Court of Appeals' present decision, by recruiting ninety-nine accomplices, the individual reduces his liability to $10 and §2520 becomes emasculated.

The Court of Appeals' rationale in this case is also inconsistent with the rationale supporting its decision in *Ljepava v. M. L. S. C. Properties, Inc.*, 511 F.2d 935 (9th Cir. 1975), where the court held that liability under the civil remedy created by the Truth in Lending Act, 15 U.S.C. §1640, is individual and not joint and several. As with the wording of §2520, 15 U.S.C. §1640 creates civil liability and provides for liquidated damages to be recovered against *any creditor* who fails to comply with the requirements of the Truth in Lending Act. The two statutes are almost identical in design. Both statutes prohibit certain activity and provide persons injured by that activity with a civil cause of action against each person causing the injury. Further, both statutes provide for actual or liquidated damages on behalf of the injured person. Thus, the Court of Appeals ruled in *Ljepava* that an injured person is entitled to recover liquidated damages against each defendant, and that his recovery is individual. Yet, under §2520, the Court of Appeals now holds that each defendant is jointly and severally rather than individually liable. It is noteworthy that the remedial effect of §2520 is even stronger than its counterpart

in the Truth in Lending Act. Section 2520 contains a minimum liquidated damage of $1,000, whereas 15 U.S.C. §1640 contains a maximum of $1,000.

B. Section 2520 Mandates an Award of Reasonable Attorney's Fees and Other Litigation Costs Reasonably Incurred.

Although the twelve petitioners incurred over $40,000 in attorney's fees and over $10,000 in costs in successfully litigating their claims against the respondents, the Court of Appeals has upheld the District Court's limited award of $12,000 in attorney's fees and $4,690.48 in costs. Petitioners respectfully submit that the Court of Appeals' decision contradicts the mandate of §2520 which provides that a successful plaintiff *shall* be entitled to recover a reasonable attorney's fee and other litigation costs reasonably incurred.

Although there are no reported case decisions discussing reasonable attorney's fees pursuant to §2520, there are appellate decisions in other federal statutory actions which offer some guidelines. For example, in actions under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-2000e-5, the courts have explicitly stated that attorney's fees should be liberally awarded. In *Rosenfeld v. Southern Pacific Co.*, 519 F.2d 527, 529-530 (9th Cir. 1975), the Court of Appeals affirmed the District Court's award of $30,000 in attorney's fees (based upon 407 hours of counsel's time) to the successful Title VII plaintiff, noting among other factors that (1) plaintiff's attorneys were experienced and competent, (2) the case was one of significance as a precedent in a new and fast-developing field of law, and (3) in the legal community, lawyers with similar reputation and standing would have charged a fee in excess of $30,000. See also, *Sagers v. Yellow*

Freight Systems, Inc., 529 F.2d 721, 739 (5th Cir. 1976); *Drew v. Liberty Mutual Insurance Co.*, 480 F.2d 69 (5th Cir. 1973), *cert. den.*, 417 U.S. 935, 94 S.Ct. 2650 (1974).

It should be noted that in *Rosenfeld v. Southern Pacific Co., supra*, the award of attorney's fees was not limited to the amount of the judgment, as in the instant case, since in *Rosenfeld*, the plaintiff was denied damages in the action, but did prevail on her prayer for declaratory and injunctive relief. Moreover, it is noteworthy that, unlike §2520, which is involved in this case, the appropriate provision of Title VII of the Civil Rights Act, 42 U.S.C. §2000e-5(k), does not mandate an award of reasonable attorney's fees, but rather provides that the court, in its discretion, may allow the prevailing parties such fees. The policy in awarding attorney's fees under a mandatory provision such as 18 U.S.C. §2520 should be no less than under the discretionary provision contained in Title VII of the Civil Rights Act.

Petitioners respectfully submit that without an award of reasonable attorney's fees, the congressional design to secure the public's right of privacy under §2520 will be frustrated. Without an award of reasonable attorney's fees, an action such as this, with sweeping value as a precedent, could not be brought to protect the right of privacy against obnoxious intrusions by an unrestrained and abusive police power. Without an award of reasonable attorney's fees to compensate counsel for difficult and complex litigation such as this, one of society's basic freedoms will have suffered a major defeat.

With respect to the award of costs, the Court of Appeals upheld the District Court's post-trial order

that the petitioners' costs would be determined through a bill of costs under Rule 54(d) of the Rules of Civil Procedure. Although petitioners did subsequently file their verified bill of costs, the clerk of the District Court reduced the award, by striking, inter alia, the travel expenses and subsistence expenses of the petitioners who travelled from out of state to attend the trial in Reno, Nevada. In its opinion, the Court of Appeals stated that it had no power to review the ruling of the District Court clerk under the 1904 decision in *Guffey v. Alaska & P.S.S. Co.*, 130 Fed. 271, 279 (9th Cir. 1904).

Petitioners respectfully submit that the turn-of-the century decision in *Guffey* cannot render a Court of Appeals powerless to enforce the mandatory costs provisions of a modern day statute, such as §2520. Furthermore, an award of costs under §2520 is not governed by Rule 54(d) of the Federal Rules of Civil Procedure, which is limited to those instances where there is not an "express provision" for costs under a statute of the United States.

C. Because the Entire Illegal Wiretapping Was Found to Be Oppressive, All of the Petitioners Were Entitled to a Jury Instruction on Punitive Damages as Against All Respondents Other Than Butner and Whitmire.

The District Court limited the jury instructions as to punitive damages in two ways. First, the Court limited the instruction on behalf of only two of the petitioners, Nathan S. Jacobson and ALW, Inc. Secondly, the Court limited the instruction as against respondents other than Nevada Bell, Butner and Whitmire. Thus, on appeal there were two issues before the Court of Appeals. However, in its decision, the Court of

Appeals completely avoided the first issue and directed itself solely to the issue of limiting the instructions against respondents other than Nevada Bell, Butner and Whitmire. As noted, petitioners did not object to the jury not receiving the instructions as against Butner and Whitmire, but did object to the instructions not being given against Nevada Bell.

With respect to the first issue relative to punitive damages that was not decided by the Court of Appeals, petitioners respectfully submit that all of the petitioners were entitled to jury instructions on punitive damages. It is clear that the invasion of privacy brought about by the conduct of respondents affected all of the petitioners, not just Nathan S. Jacobson and ALW, Inc., since, as the District Court specifically found, the illegal wiretapping was oppressive in nature. Thus, although the Court of Appeals did not address this issue, the evidence in this case unquestionably supported instructions on punitive damages on behalf of all petitioners. This is especially true under the Court of Appeals' own decisional law which requires instructions on punitive damages, not only when the defendant's conduct is malicious, willful or wanton, but also when the defendant's conduct is reckless so as to imply a disregard of social obligations even without any showing that the defendant had any personal animosity toward the plaintiff. See, *Gill v. Manuel*, 488 F.2d 799, 801 (9th Cir. 1973); *Reynolds Metals Co. v. Lampert*, 316 F.2d 272, 274 (9th Cir. 1963).

With respect to the second issue regarding punitive damages, it defies reason to suggest that the court-ordered deadline, which was violated by all respondents, did not apply to respondent Nevada Bell. There was

simply no dispute that Nevada Bell's own attorneys worked closely with District Attorney Rose and Assistant District Attorney Hicks on the proposed amended order, which was subsequently signed by the Washoe County Judicial Court. Yet, notwithstanding the fact that Nevada Bell knew of the contents of the amended order, including the court-ordered termination date, it permitted the interceptions to continue through the utilization of its own equipment beyond the court-imposed deadline. Furthermore, *after the deadline,* Nevada Bell sent its own employees to the Sheriff's substation, where, to correct problems that had developed on the wiretapped lines, the taps were disconnected, repaired and restarted. While at the Sheriff's substation, the Nevada Bell employees willingly overheard communications that were being intercepted and recorded. It cannot be denied, therefore, that Nevada Bell willfully assisted the other respondents in the oppressive, illegal wiretapping.

Although the Court of Appeals did address itself to this second issue concerning punitive damages, it avoided its own decisions and concluded that the District Court properly limited the instructions as to respondents other than Nevada Bell. Petitioners respectfully submit that the evidence at trial clearly manifested wanton, reckless and malicious conduct on the part of the Washoe County authorities and Nevada Bell. However, under the Court of Appeals' own decisions, actual maliciousness need not be shown to support a jury instruction on punitive damages. For example, in *Reynolds Metals Co. v. Lampert, supra,* the Court of Appeals reversed the District Court's ruling which had withdrawn a claim for punitive damages from the jury's consideration in an action involving injury

to crops by the defendant's industrial plant fumes. In the *Reynolds Metals Co.* case, the Court of Appeals stated:

> "Where there is evidence that the injury was done maliciously *or* willfully and wantonly or committed with that motive or *recklessly so as to imply a disregard of social obligations,* punitive damages are justified." (Original and added emphasis).

See also, *Lampert v. Reynolds Metals Co.,* 372 F.2d 245, 247-248 (9th Cir. 1967), and *Gill v. Manuel, supra* (where the Court of Appeals stated that an instruction on punitive damages is appropriate when the facts are such that the jury could find the conduct on the part of the defendants to be willful, apart from any showing of the defendants' personal animosity towards the plaintiffs).

The petitioners submit that the evidence in this case more than supported jury instructions as to punitive damages on behalf of all petitioners against respondents Rose, Galli, Hicks, Benham, and Nevada Bell.

Although the jury did not award punitive damages on behalf of Nathan Jacobson or ALW, Inc., petitioners submit that the verdict forms given to the jury, which conformed with the District Court's pretrial order, led the jury as well as the petitioners to believe that each petitioner would receive $1,000 in statutory damages from each of the respondents. In this regard, the verdict forms given to the jurors provided that, if liability were found, each petitioner would recover $1,000 from each respondent. Thus, the verdict forms might well have influenced the jury not to award punitive damages to petitioners Nathan Jacobson and

ALW, Inc., since, in filling out the verdict forms, the jury could have assumed that petitioners Nathan Jacobson and ALW, Inc., would each receive a judgment of $7,000, that is, $1,000 from each respondent. Conceivably, had the jurors known that each petitioner would be limited by the District Court's post-trial ruling to a judgment of only $1,000, punitive damages would have been awarded.

2. The Court of Appeals' Decision, Permitting the Defense of Good Faith Reliance Upon a Court Order, Is Without Precedent in View of the Fact That the Wiretapping Was Knowingly Conducted for Several Days Beyond the Deadline Specified in the Respondents' Own Sought-After Court Order.

A. The Defense of Good Faith Reliance Upon a Court Order Cannot Apply to Nevada Bell Because Nevada Bell, by Knowingly Assisting in the Wiretapping Beyond the Court-Ordered Deadline, Did Not Have a Subjective Good Faith Belief That Its Conduct Was Legal. In Any Event, Nevada Bell Did Not Rely on the Court Order and Its Conduct Was Objectively Unreasonable.

The Court of Appeals has ruled that Nevada Bell was entitled to the defense of good faith reliance upon a court order under the subjective/objective test enunciated in *Zweibon v. Mitchell,* 516 F.2d 594, 671 (D.C. Cir. 1975), *cert. den.,* 425 U.S. 944 (1976); and *Wright v. Florida,* 495 F.2d 1086, 1090 (5th Cir. 1974); see also, *Pierson v. Ray,* 386 U.S. 547, 87 S.Ct. 1213 (1967). These cases provide such a defense, if the defendant had the subjective good faith belief in the propriety of his conduct *and* this belief was itself objectively reasonable.

None of the cases utilizing the subjective/objective test, however, involves the failure to observe a court order. In this case, of course, Nevada Bell (1) assisted in drafting the court order which authorized the initial wiretaps and, hence, Nevada Bell knew of the court-ordered deadline; (2) set up the wiretapping equipment that was utilized by the other respondents; and, (3) had its own employees work on the wiretapped lines after the court-ordered termination date. Undoubtedly, by knowing of the termination date in the court order, Nevada Bell could not, in law or fact, claim a subjective good faith belief that it was acting pursuant to a court order, when it sent its own employees after the termination date to repair the wiretapped lines so that the illegal conduct could continue. Moreover, by knowing of the termination date in the court order, Nevada Bell's conduct cannot be considered objectively reasonable.

The subjective/objective test enunciated by the courts cannot logically be applied to Nevada Bell's conduct in this case. In the cases applying this test, the defendants were acting under a statute or regulation which was subsequently overturned, or the defendants were exercising their discretion in making warrantless arrests and searches, which they contended were lawful. Clearly, Nevada Bell would be entitled to the defense of good faith reliance upon a court order under the subjective/objective test *if* Nevada Bell had obeyed its own sought-after order, and the petitioners had subsequently based their civil complaint on the fact that the evidence gathered pursuant to the court order had been suppressed, that is, on the fact that the surveillance was later deemed to be unconstitutional. Under such a factual setting, Nevada Bell could prop-

erly claim that its subjective good faith belief in following the order was objectively reasonable and thus be entitled to the defense. Yet, such is not the case with respect to Nevada Bell's conduct in the instant matter, inasmuch as Nevada Bell failed to follow the directives contained in the order which its own counsel assisted in drafting and presenting to the Washoe County Judicial District Court.

Moreover, from the objective standard, Nevada Bell's conduct was completely unreasonable. Under the objective standard, once Nevada Bell, together with the other respondents, had secured the order, it is apparent that Nevada Bell was legally bound to obey it. Nevada Bell had actual knowledge of the termination date in the court order, yet directed its employees, after the termination date, to repair problems on the wiretapped lines so that the illegal surveillance could continue. At trial, there was simply no evidence contradicting Nevada Bell's conduct in this regard.

B. The Defense of Good Faith Reliance on a Court Order Cannot Apply to Respondents Whitmire and Butner, Inasmuch as They Would Not Have Violated Petitioners' Right of Privacy in Defiance of the Court Order, Had They Actually Relied Upon the Order.

As with Nevada Bell, respondents Butner and Whitmire cannot claim the defense of good faith reliance upon a court order. Despite the decision of the Court of Appeals, there was no contradiction in the evidence that respondents Butner and Whitmire knowingly involved themselves in the illegal wiretapping and intercepting of the petitioners' communications. As the District Court noted, the wiretap was operated in an oppressive manner and that there had not been "one

iota of evidence" at trial which would indicate reasonable reliance on a court order. Thus, the Court of Appeals' decision, reversing the District Court's directed verdicts against respondents Butner and Whitmire flies in the face of the good faith test enunciated in §2520, simply because subjectively and objectively these respondents' conduct could not warrant such a defense.

Conclusion.

For the reasons stated above, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Ninth Circuit.

Dated: April 17, 1979.

Respectfully submitted,

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APPENDIX "A".

Opinion.

United States Court of Appeals, for the Ninth Circuit.

Nathan S. Jacobson, Ronald Friedland, Richard F. Levy, Sandy Jacobson, Forrest Paull, Edward Jacobson, et al., Plaintiffs-Appellants, vs. Robert Rose, etc., et al., Defendants-Appellees, No. 77-1196.

Nathan S. Jacobson, et al., Plaintiffs-Appellees, vs. Bell Telephone Co., of Nevada, Defendant-Appellant, No. 77-1210.

Nathan S. Jacobson, et al., Plaintiffs-Appellees, vs. Robert Rose, etc., et al., Defendants-Appellants. No. 77-1314.

Filed: Nov. 29, 1978.

Appeal from the United States District Court for the District of Nevada.

Before: CHOY and KENNEDY, Circuit Judges, and SCHNACKE,* District Judge.

CHOY, Circuit Judge:

Appellants brought suit against certain officials of Washoe County, Nevada, and Bell Telephone Company of Nevada, seeking civil damages for an allegedly illegal wiretap pursuant to Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §2520. Appellants claim that the district court improperly limited its award to them. The Washoe County officials and Nevada Bell cross-appeal, claiming that

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*The Honorable Robert H. Schnacke, United States District Judge for the Northern District of California, sitting by designation.

the district court impermissibly failed to instruct the jury on certain defenses. We affirm in part, and reverse and remand in part.

I. *Statement of the Case*

In September, 1971, the Washoe County Sheriff's Department and District Attorney's Office sought a court order authorizing wiretapping of certain telephone lines at the Kings Castle Hotel and Casino, purportedly to uncover information concerning a possible kidnapping at Kings Castle. On September 20, 1971, District Attorney Rose obtained an "Order for the Authorization to Intercept Wire Communications"[1] from a state judge. The order specified that it would terminate thirty days from its date. The order also "requested" that Nevada Bell "cooperate in every respect" with the government officials. Upon receiving a copy of the order, Nevada Bell requested that a more precise order be drafted apparently to ensure compliance with applicable law. Rose and his deputy, Hicks, redrafted the order in cooperation with Nevada Bell, obtaining court approval of the revised order on September 29, 1971. The second order set the period of authorized interception as thirty days from the date of the original order of September 20.[2]

[1]The order read in part:

> This authorization is granted to the Washoe County Sheriff's Office and the Washoe County District Attorney's Office, and it is requested that Bell Telephone Company cooperate in every respect with these agencies in effectuating these interceptions. This authorization shall terminate in thirty days from the date of this order.

[2]The second order read in part:

> This order will terminate when the communications concerning threats to Ray Melvin Landucci or others and the admissions between the individuals involved in this kidnapping which identify such individuals have been intercepted. Even if such communications are not intercepted, this order shall terminate thirty (30) days from the original order, which is dated September 20, 1971.

Benham, Chief Deputy of the Sheriff's Department and the individual responsible for effecting the wiretap, learned of the issuance of the second order. Without seeing the order but having been told of its contents he assumed that the second order provided for interception for thirty days from the signing of the second order. After preliminary work by Nevada Bell and after encountering technical difficulties, Benham and other sheriff's officials succeeded in making the intercept operational on October 18, 1971. Benham closed down the intercept on October 29, 1971, thirty days after the signing of the second order. The wiretaps provided no information useful in investigating the alleged kidnapping.

In May, 1972, Jacobson and others whose conversations were allegedly wiretapped filed a class action suit for recovery of statutory liquidated damages (not actual damages), attorneys' fees, and costs, as provided in § 2520.[3] Having denied class action status, the

[3]Section 2520 provides:

> Any person whose wire or oral communication is intercepted, disclosed, or used in violation of this chapter shall (1) have a civil cause of action against any person who intercepts, discloses, or uses, or procures any other person to intercept, disclose, or use such communications, and (2) be entitled to recover from any such person—
>
> (a) actual damages but not less than liquidated damages computed at the rate of $100 a day for each day of violation or $1,000, whichever is higher;
>
> (b) punitive damages; and
>
> (c) a reasonable attorney's fee and other litigation costs reasonably incurred.
>
> A good faith reliance on a court order or legislative authorization shall constitute a complete defense to any civil or criminal action brought under this chapter or under any other law.

district court on April 10, 1975, granted plaintiffs leave to amend their complaint to add as plaintiffs other individuals whose conversations were allegedly overheard. On October 17, 1975, a stipulated pretrial order was filed in which plaintiffs' claim was stated to be for statutory liquidated damages, no mention being made of actual damages. After extensive discovery, a jury trial commenced. On the second day of the trial, appellants unsuccessfully sought leave to amend their complaint to ask for actual damages.

At the close of the defense's case, the district court directed verdicts against defendants Rose, Hicks, Benham, and Galli, Sheriff of Washoe County, as to statutory liquidated damages. The district judge gave to the jury the claims for statutory damages against Nevada Bell, Butner, a lieutenant with the Sheriff's department, and Whitmire, a deputy sheriff.[4] The judge also instructed the jury on punitive damages as to Rose, Hicks, Galli, and Benham. The judge refused to give defendants' proposed instruction setting forth a defense based on good faith reliance on a court order, concluding that "[t]here is no way you can misinterpret an order that you have never seen." The court also refused to instruct the jury as to prosecutorial immunity for Rose and Hicks, "finding that the attorney defendants were not acting as attorneys."

Though not awarding punitive damages, the jury found Butner, Whitmire, and Nevada Bell liable for statutory damages. The jury awarded the statutory maximum, $1000, against each of the seven defendants. The court later determined that defendants' liability should be joint and several and not individual. It therefore reduced the award to $1000 for each plaintiff as against all seven defendants jointly, for a total judgment of $12,000. The court also awarded $12,000 in attorney's fees pursuant to § 2520(b). The court clerk awarded costs to plaintiffs.

[4]The amended complaint also included claims against Jensen and Adamson, employees of the Sheriff's office. The court dismissed the claims against Jensen, apparently because he died before judgment. The court also granted summary judgment in favor of Adamson. These rulings are not before this court.

II. *Appellants' Claims*

A. *Leave to Amend*

Appellants assert that the district judge abused his discretion in refusing to allow them to amend their complaint to seek actual damages.

"It is settled that the grant of leave to amend the pleadings pursuant to Rule 15(a) is within the discretion of the trial court." *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 330 (1971); *Waters v. Weyerhaeuser Mortgage Co.*, No. 76-1813, ... F.2d ...., ..., slip op. at 3155 (9th Cir. September 21, 1978); *Komie v. Buehler Corp.*, 449 F.2d 644, 647 (9th Cir. 1971).[5] The Supreme Court has instructed that in exercising its discretion the trial court should consider the potential prejudice to the other parties. *Zenith Radio*, 401 U.S. at 330-31. We have also noted that delay in seeking an amendment is a common reason for refusing leave. *Komie*, 449 F.2d at 647-

[5]Because a pretrial order had already been filed, the introduction of the claim for actual damages would require amendment to the pretrial order. We have noted that as with amendments to pleadings, "[a]bsent a showing of clear abuse of discretion by the district judge . . . the exercise of such discretion under Rule 16 [providing for amendment of pretrial orders] will not be disturbed on appeal." *Angle v. Sky Chef, Inc.*, 535 F.2d 492, 495 (9th Cir. 1976).

48. For example, in upholding a district judge's refusal to allow an amendment regarding agency to pleadings and the pretrial order, we wrote:

> Here there were "justifying" reasons [for rejecting the amendment] which were readily apparent. The motion was made 31 months after the answer was filed, eleven months after the pretrial statement was signed, and more than six months after the case was set for trial. There had been extensive discovery none of which had been directed to [the issue sought to be added]. The proposed amendment was not based upon any facts which were not known or readily available to the defendants and their counsel, at least when the pretrial statement was signed.

Id. at 648. *See Waters,* .... F.2d at ...., slip op. at 3155-56.

In the instant case the plaintiffs' motion to amend came on the second day of trial, two months after the trial court had ordered the close of discovery, some 50 months after the action was filed, 15 months after the filing of the first amended complaint, and nine months after the filing of the pretrial order. Not based on any newly-revealed material facts, the amendment would have interjected an entirely new issue into the trial. Following *Komie* and *Waters,* we conclude that the district court did not abuse its discretion in refusing to allow the proposed amendment.[6]

[6]Appellants refer to cases dealing with amendment pursuant to Rule 15(b) of pleadings to conform to proof accepted at trial through tacit consent of both parties. E.g., Rosden v. Leuthold, 274 F.2d 747, 750 (D.C. Cir. 1960). Appellees here, however, contested the introduction of such nonconforming proof, and thus any amendment would have to be made pursuant to the provisions of Rule 15(a).

B. *Punitive Damages*

Appellants next contend that the trial judge erred in restricting its instruction on punitive damages to certain defendants. We have noted, however, that "[n]o error is committed by failure to give an instruction which finds no support in the evidence." *Southern Pacific Co. v. Villarruel,* 307 F.2d 414, 415 (9th Cir. 1962). *See Bechtel v. Liberty National Bank,* 534 F.2d 1335, 1342 (9th Cir. 1976). In order to receive punitive damages under § 2520, appellants must show that defendants acted wantonly, recklessly, or maliciously. *Halperin v. Kissinger,* 434 F. Supp. 1193, 1195 (D.D.C. 1977). *See Scott v. Donald,* 165 U.S. 58, 86-89 (1897); *Lake Shore & Michigan Southern Railway Co. v. Prentice,* 147 U.S. 101, 106-07 (1893). Having reviewed the record, we think the district court limited the instruction as to punitive damages in accord with the evidence proffered. We refuse to accept appellants' claim that the events surrounding the wiretapping, of themselves, manifest the necessary wantonness, recklessness, or maliciousness.

C. *Joint Liability*

Appellants next claim that the language in § 2520 providing that an aggrieved individual shall "be entitled to recover from any such person" who illegally wiretaps indicates that Congress intended recovery for liquidated damages to be against each defendant individually and not jointly.

Appellants' interpretation is inconsistent with the language and purpose of § 2520. Section 2520 provides that the victim shall "be entitled to recover from any such person" actual or liquidated damages, punitive damages, reasonable attorney's fees, and costs. If "any

such person" means that liability is individual, then a plaintiff could recover actual or liquidated damages in a § 2520 action in excess of actual loss. Indeed, the amount of recovery would depend on the number of defendants named. This result does not comport with the common understanding that these types of damages are intended to reimburse a plaintiff for his losses and not to provide a windfall against multiple defendants. *See Scott,* 165 U.S. at 86-89; *Lake Shore,* 147 U.S. at 107. In the absence of a clear congressional direction, we cannot attribute to Congress a purpose to disregard this common understanding.

Appellants' reading also ignores the explicit congressional allowance of punitive damages under subsection (b) of § 2520. Punitive damages are traditionally designed to punish and deter and thus may exceed the aggrieved party's actual loss. *Scott,* 165 U.S. at 86-89; *Lake Shore,* 147 U.S. at 107; Prosser on Torts § 2, at 9 (4th ed. 1971).[7] If actual or liquidated damages are multiplied by the number of defendants, such damages would exceed actual loss and become punitive in nature, rendering the provisions for punitive damages superfluous. Generally, we will not read a statute to render language superfluous. *See Pettis ex rel. United States v. Morrison-Knudsen Co.,* 577 F.2d 668, 673 (9th Cir. 1978); *Hart v. McLucas,* 535 F.2d 516, 519 (9th Cir. 1976).[8]

[7]This unique function of punitive damages suggests that in a proper case we might determine that § 2520 does require award of punitive damages against defendants individually and not jointly.

[8]Appellants cite Ljepava v. M.L.S.C. Properties, Inc., 511 F.2d 935, 945 (9th Cir. 1975), where we held that civil penalties under the Truth in Lending Act should have been awarded individually against each promisee. As noted above, however, the purpose of allowing recovery for actual or liquidated damages is to compensate for loss and not to provide a penalty. Moreover, in *Ljepava* there were ten separate promissory notes while in the present case appellants complain of just one wiretapping. See 511 F.2d at 939.

Finally, appellants' reading is also inconsistent with the congressional goal of providing a civil remedy to victims whose privacy has been unlawfully invaded by wiretapping. S. Rep. No. 1097, 90th Cong., 2d Sess., *reprinted in* [1968] U.S. Code Cong. & Ad. News 2112, 2156. Without clear language to the contrary, we must assume that in providing a federal remedy for invasion of privacy through wiretapping, Congress intended to follow the traditional rule limiting compensatory damages for tortious invasion of personal rights to actual loss. *See* Prosser at 9.[9] In short, the district court properly awarded damages jointly. *See Halperin,* 434 F. Supp. at 1196.[10]

D. *Costs*

Pursuant to Rule 54(d) of the Federal Rules of Civil Procedure, the clerk of the district court awarded

[9]Appellants assert that the deterrent effects of § 2520 would be enhanced were civil awards made individual rather than joint. Again we note that the purpose of providing for actual and liquidated damages is to compensate. Moreover, if greater awards are necessary to provide sufficient deterrence, that is a contention properly addressed to Congress and not this court.

[10]The jury initially awarded plaintiffs $1000 against each defendant. The district judge later found the defendants jointly and severally liable and so reduced the award. Appellants argue that had the jury known that the compensatory award would be the lesser sum, they might have awarded punitive damages. The trial judge instructed the jury that it could award punitive damages if it found the necessary requisites such as wantonness, maliciousness, or oppressiveness. We must presume that the jury followed its instructions, Gray v. Shell Oil Co., 469 F.2d 742, 752 (9th Cir. 1972), *cert. denied,* 412 U.S. 943 (1973), and concluded that punitive damages were not appropriate under the facts of this case.

costs to appellants and later reduced the award in response to appellees' contentions. Appellants now claim that the award should have been greater.

Although in a proper case this court may review the district court's allowance of costs, we have held that "[i]n the absence of a showing in the record that this matter was brought to the attention of the lower court . . . , this court has no power to review the ruling of the clerk . . . ." *Guffey v. Alaska & P. S. S. Co.*, 130 Fed. 271, 279 (9th Cir. 1904). Because the record does not indicate a request for district court review of the clerk's award, we will not review the award.

E. *Attorney's Fees*

Section 2250(c) provides that an aggrieved party shall be awarded reasonable attorney's fees. Appellants requested that the district court award $40,000 while appellees suggested that $12,000 would be appropriate. After hearing counsel for both sides, the district court adopted the appellees' suggestion.

We have held that "[t]he amount of attorney's fees to be awarded is . . . within the discretion of the trial court and will not be disturbed absent an abuse of discretion." *Kerr v. Screen Extras Guild, Inc.*, 526 F.2d 67, 69 (9th Cir. 1975), *cert. denied*, 425 U.S. 951 (1976). *See Moore v. Teflon Communications Corp.*, Nos. 75-3704, 76-2134, 77-1466, ... F.2d ....., ..., slip op. at 1810 (9th Cir. June 9, 1978). Having reviewed the record, we cannot say that the district judge abused his discretion in adopting the

appellees' suggestion after affording both sides an opportunity to be heard.[11]

III. *Appeal of Nevada Bell*

A. *Violation of Statute*

Section 2520 provides for recovery against one who unlawfully "intercepts, discloses, or uses, or procures any other person to intercept, disclose, or use" a wire or oral communication. Section 2510(4) defines 'intercept" to mean the "aural acquisition of the contents" of a communication. Nevada Bell contends that because none of its employees actually listened to tapped conversations, it has not violated the statute.

We disagree. In enacting Title III Congress intended to establish sanctions that would deter illegal invasions of privacy through wiretapping. S.Rep. No. 1097, 90th Cong., 2d Sess., *represented* in [1968] U.S. Code Cong. & Ad. News 2112, 2156. When many individuals together take the steps necessary for the recording of telephone conversations, the victim's privacy is violated, regardless of which particular individuals actually listen

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[11]Appellants argue that the district judge improperly limited its award because he believed that he could not award attorney's fees in an amount greater than the judgment. The record indicates that counsel for appellees initially suggested the $12,000 figure as a "fair and reasonable attorney's fee," noting additionally that it was "actually the same as the judgment." After hearing counsel for both sides, the district judge adopted the $12,000 figure. Though he noted that he had not found cases where attorney's fees were awarded in an amount in excess of the judgment, he also pointed to other considerations like the complexity of issues and possible excesses by appellants' counsel, concluding:

> Weighing all the factors involved here, I agree with [counsel for appellees] that the sum of $12,000 for attorney fees would be reasonable and proper in this particular case.

We cannot say that the district judge abused his discretion.

to the tapes. Additionally, we do not believe that Congress meant to allow those tapping phones to determine the possible scope of civil liability by their limiting who among them would listen to the tapes.

This interpretation is reinforced by the traditional rule respecting concerted tortious acts—here the invasion of privacy. As Professor Prosser has explained:

> Where two or more persons act in concert, it is well settled . . . that each will be liable for the entire result. . . . In legal contemplation, there is a joint enterprise, and a mutual agency, so that the act of one is the act of all, and liability for all that is done must be visited upon each.

Prosser § 52, at 314-15. Because Nevada Bell joined with the Washoe officials in the wiretapping, its failure to listen to the tapes should not insulate it from liability for the invasion of privacy it helped to occasion. *See White v. Weiss,* 535 F.2d 1067, 1071 (8th Cir. 1976); *Gerrard v. Blackman,* 401 F. Supp. 1189, 1190 (N.D. Ill. 1975).[12]

[12]Bell cites cases holding that the use of a pen register, which records the numbers to which calls are placed, does not fall within Title III. *E.g.,* Application of United States *in re* Order Authorizing Use of a Pen Register, 538 F.2d 956, 958 (2d Cir. 1976), *cert. granted sub nom.* United States v. N.Y. Telephone Co., 429 U.S. 1072 (1977); United States v. Illinois Bell Telephone Co., 531 F.2d 809, 812 (7th Cir. 1976). Unlike the instant case, however, Congress specifically indicated that Title III should not extend to pen registers. S. Rep. No. 1097 at 2178; *see* Hodge v. Mountain States Tel. & Tel. Co., 555 F.2d 254, 257-58 (9th Cir. 1977). Moreover, while pen registers have been excluded from the scope of Title III because they do "not disclose the contents of any conversation," United States v. Bowler, 561 F.2d 1323, 1325 (9th Cir. 1977), the very purpose of wiretapping is to obtain the contents.

Bell also cites United States v. Turk, 526 F.2d 654 (5th Cir.), *cert. denied,* 429 U.S. 823 (1976), where the Fifth Circuit held that there was no violation of Title III when police played tapes given to them by a suspect because the police had not been involved in the recording of the tape. In our case Bell was involved in the setting up of the recording devices. *See* 526 F.2d at 658 n.3. Equally inapposite is Broadway v. City of Montgomery, 530 F.2d 657 (5th Cir. 1976), where defendant-police officers had not even known of the wiretap until after the victim had found the tape recorder recording his conversations.

We appreciate Bell's concern that it may be held liable for cooperating with the police at the request of the Nevada state court. But the proper response to that concern is not to emasculate the statute. Congress appreciated this potential dilemma and established a defense for good faith reliance on a court order. It is upon such a defense that Bell must rely.

B. *Good Faith Defense of Nevada Bell*

The district court should have instructed the jury on the good faith defense provided by § 2520 as to defendant Nevada Bell. Section 2520 reads in part:

> A good faith reliance on a court order or legislative authorization shall constitute a complete defense to any civil or criminal action brought under this chapter or under any other law.

Congress established this defense in part "to protect telephone companies or other persons who cooperate under court order with law enforcement officials." 115 Cong. Rec. 37193 (1969) (Sen. Tydings).[13]

[13]The debates included the following discussion:

> Mr. McCLELLAN. [W]e learned that a number of telephone companies were sincerely and seriously concerned that, should they cooperate with the Federal law enforcement officers, even though the officers were acting under court order, they might subject themselves to civil or criminal liability under State law.
>
> In enacting title III, it was our intention that good faith cooperation with law enforcement officers would be

(This footnote is continued on next page)

Although § 2520 does not define "good faith," the Senate Report on the unamended version of § 2520[14] suggests an analogy to the good faith defense allowed in § 1983 cases. S. Rep. No. 1097 at 2196.[15] That

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an absolute defense to civil or criminal liability, State or Federal.

I recognize, however, that the language of title III on this point may be somewhat ambiguous. . . .

Consequently, I should like now to offer an amendment that would make congressional intent . . . under title III of last year's act . . . unequivocal: that good faith cooperation by a telephone company or other individual with law enforcement officials would not subject such an individual or company to criminal or civil liability. . . .

. . .

Mr. TYDINGS. . . . There is no question that the original legislative intent of title III of the Safe Streets Act of last year was to protect telephone companies or other persons who cooperate under court order with law enforcement officials.

. . .

Mr. McCLELLAN. . . . It would be ridiculous for us to authorize electronic surveillance or wiretapping and then leave exposed to criminal or civil liability those who cooperate in good faith with the officers in carrying out an order of the court to make such surveillance. It is on this basis, therefore, that I think the amendment is proper.

115 Cong. Rec. 37192-93 (1969). Senator McClellan's amendment is the amended version of the good faith defense cited above. *Id.* at 37193.

[14]Congressional debate over the 1969 amendments to §2520 indicate that the amendments were intended to clarify and not change the purpose and meaning of the original provisions. *See* note 13 *supra*.

[15]The Report states:

> A good faith reliance on a court order would constitute a complete defense to an action for damages. (Compare *Pierson v. Ray*, 87 S.Ct. 1213, 386 U.S. 547 (1967)).

In *Pierson* plaintiffs brought an action under 42 U.S.C. § 1983 alleging that their arrest by police under a breach of the peace statute violated their civil rights. The Fifth Circuit held that the police could not assert a good faith defense under § 1983. 386 U.S. at 550. Reviewing the rationale for the good faith defense, the Supreme Court disagreed:

defense obtains only if the defendant held a subjective belief which was objectively reasonable that he was acting legally. *See, e.g., Pierson v. Ray*, 386 U.S. 547, 555-57 (1967); *Bivens v. Six Unknown Agents of the Federal Bureau of Narcotics*, 456 F.2d 1339, 1347-48 (2d Cir. 1972). Applying that formula to the § 2520 context, we hold that a defendant may invoke the defense of good faith reliance on a court order only if he can demonstrate (1) that he had a subjective good faith belief that he acted legally pursuant to a court order; and (2) that this belief was reasonable. *See Zweibon v. Mitchell*, 516 F.2d 594, 671 (D.C. Cir. 1975), *cert. denied*, 425 U.S. 944 (1976); *Wright v. Florida*, 495 F.2d 1086, 1090 (5th Cir. 1974).

There was sufficient testimony at trial which if believed by the jury would establish that Nevada Bell held an honest and reasonable belief that it acted legally pursuant to a court order. The first court order specifically requested that Nevada Bell assist the Washoe officials.[16] There was testimony that upon receiving notice of the first order, Nevada Bell asked the Washoe officials to draft a supplemental order to ensure compliance with applicable law. The jury could have found that Nevada Bell completed its work on the wiretaps prior to the termination date of the two orders. And the jury could also have found that

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> We hold that the defense of good faith and probable cause . . . is also available . . . under § 1983. . . . If the jury believed the testimony of the officers and disbelieved that of the [plaintiffs], and if the jury found that the officers reasonably believed in good faith that the arrest was constitutional, then a verdict for the officers would follow even though the arrest was in fact unconstitutional.

Id. at 557.

[16]*See* note 1 *supra*.

Nevada Bell acted reasonably and in good faith in assuming that the police would comply with the court order, thereby obviating the need for Nevada Bell to "police" the police.

We do not, of course, express any opinion as to whether a jury should find good faith on the part of Nevada Bell. We conclude only that there was testimony which if believed by a jury could warrant a finding that Nevada Bell acted in good faith reliance on a court order. Accordingly, we reverse and remand to the district court either to enter a judgment N.O.V. for Nevada Bell if it determines the record warrants such a ruling in light of this opinion or to allow Nevada Bell's good faith defense to go to the jury. *See Fountila v. Carter,* 571 F.2d 487, 489-90 (9th Cir. 1978); *Chisholm Brothers Farm Equipment Co. v. International Harvester Co.,* 498 F.2d 1137, 1140 (9th Cir.), *cert. denied,* 419 U.S. 1023 (1974).

IV. *Appeal of Washoe Officials*

A. *Prosecutorial Immunity*

The district court correctly concluded that Rose and Hicks did not enjoy the quasi-judicial immunity against suit afforded prosecutors performing quasi-judicial functions. In *Imbler v. Pachtman,* 424 U.S. 409 (1976), the Supreme Court held a prosecutor immune from a § 1983 suit when

> respondent's activities were intimately associated with the judicial phase of the criminal process, and thus were functions to which the reasons for absolute immunity apply with full force. We have no occasion to consider whether like or similar reasons require immunity for those aspects of the prosecutor's responsibility that cast him in the role of an administrator or investigative officer rather than that of advocate.

Id. at 430-41 (footnotes omitted). Although the Supreme Court did not consider immunity for activities which are not quasi-judicial, this court has held that if the prosecutor "committed acts, or authoritatively directed the commission of acts, which ordinarily are related to police activity as opposed to judicial activity, then the cloak of immunity should not protect them." *Robichaud v. Ronan,* 351 F.2d 533, 537 (9th Cir. 1965).[17] *See Sykes v. California,* 497 F.2d 197, 200-01 (9th Cir. 1974).

The district judge found that Hicks and Rose acted in an administrative and not a judicial manner. He observed that they did not simply render legal advice to the Sheriff's office, but instead joined in implementing the wiretap. The district judge noted, for example, that the court order authorized wiretapping by the District Attorney's Office as well as by the Sheriff's Office. We believe that the district judge properly concluded that the *Imbler* immunity did not apply.

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[17]In affirming this court's decision in Imbler v. Pachtman, 500 F.2d 1301 (9th Cir. 1974), the Supreme Court wrote, referring to *Robichaud* and other decisions:

> [T]he Court of Appeals emphasized that each of respondent's challenged activities was an "integral part of the judicial process." 500 F.2d, at 1302. The purpose of the Court of Appeals' focus upon the functional nature of the activities rather than respondent's status was to distinguish and leave standing those cases, in its Circuit and in some others, which hold that a prosecutor engaged in certain investigative activities enjoys, not the absolute immunity associated with the judicial process, but only a good-faith defense comparable to the policeman's.

424 U.S. at 430. We conclude below that the good faith defense of § 2520 does not apply to Rose and Hicks. *See* § IVB *infra.*

B. *Good Faith Defense of the Officials*

These appellees/cross-appellants claim that the district court erred in not instructing the jury on their good faith defense. They claim that they each acted in good faith upon either their own misreading of the court's orders (as allowing wiretapping for 30 days from issuance of the second order) or a fellow appellee's mistaken recounting of the contents of the order. They further argue that they each believed in good faith that a fellow appellee would ensure compliance with the court orders so that they did not have to scrutinize its legality.

Earlier we noted that the good faith defense of § 2520 is available only if the defendant had a subjective belief which was obviously reasonable that he acted legally pursuant to a court order. *See* § IIIB *supra*. The district court refused to instruct the jury on the good faith defense because "[t]here is no way you can misinterpret an order that you have never seen." Except as to appellees' Whitmire and Butner, we agree that under the circumstances of this case the appellees' belief was not reasonable.

The two court orders were emphatic and clear about the termination date for the wiretapping. The second order stated: "[T]his order shall terminate thirty (30) days from the original order, which is dated September 20, 1971." We do not believe that a jury could reasonably find that either an attorney or a police officer could reasonably misinterpret this order to allow wiretapping for thirty days from the date of the second order. Given the clarity of the orders, had others seen them, they could not have but noted the obvious misreading and prevented the illegal actions. We hold that it could not be found reasonable for Sheriff Galli

or Chief Deputy Benham, the officer responsible for operation of the wiretap, not to have read the court order. To hold otherwise would compromise the congressional effort to prevent illegal wiretapping. *Cf. United States v. McIntyre,* Nos. 77-3623, 77-3716, ... F.2d ....., ... (9th Cir. September 25, 1978), slip op. at 3161 (Title III "is full of references to law enforcement officers as targets of the legislation.")

We think, however, that appellees Whitmire and Butner were entitled to have the jury instructed regarding their good faith defense. Whitmire was a deputy sheriff and Butner a lieutenant with the sheriff's department. They were not charged with primary responsibility for organizing and carrying out the wiretap. They were subordinates in the sheriff's department and in the wiretap operation. A jury might find that it was reasonable for such officers not to scrutinize a wiretap order which superiors have indicated is valid.

We must conclude that the evidence in this case would not support a finding that appellees (except for Nevada Bell, Whitmire, and Butner) had a reasonable belief that they were acting legally pursuant to a court order. The district judge therefore properly refused the good faith defense instruction. *See Bechtel v. Liberty National Bank,* 534 F.2d 1335, 1342 (9th Cir. 1976); *Southern Pacific Co. v. Villarruel,* 307 F.2d 414, 415 (9th Cir. 1962). As to appellees Whitmire and Butner, however, we conclude, as we did with regard to Nevada Bell, that a jury could find that they acted in good faith reliance on a court order. Thus, as to this issue we reverse and remand to the district court either to enter a judgment N.O.V. for Whitmire and Butner if it determines the record

warrants such a ruling in light of this opinion, or to allow Whitmire and Butner's good faith defense to go to the jury.

AFFIRMED in part, and REVERSED and REMANDED in part.

APPENDIX "B".

Order.

United States Court of Appeals, for the Ninth Circuit.

Nathan S. Jacobson, Ronald Friedland, Richard F. Levy, Sandy Jacobson, Forrest Paull, Edward Jacobson, et al. Plaintiffs-Appellants, vs. Robert Rose, etc. et al., Defendants-Appellees. No. 77-1196.

Before: CHOY and KENNEDY, Circuit Judges, and SCHNACKE*, District Judge.

The panel as constituted in the above case has voted to deny the petition for rehearing and a majority of the panel has voted to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no judge of the court has voted to grant rehearing en banc. F.R.App.P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

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*The Honorable Robert H. Schnacke, United States District Judge for the Northern District of California, sitting by designation.